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No. 914

APR 12 1943

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

NEW YORK LIFE INSURANCE COM-
PANY, a Corporation,

Petitioner,

vs.

MAE G. CHAPMAN,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
and
SUPPORTING BRIEF AND ARGUMENT.**

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INDEX.

	Page
Petition for a writ of certiorari.....	1-7
Summary statement of the matter involved.....	1
The holding of the Court of Appeals.....	4
Reasons relied on for allowance of writ.....	5
Brief in support of petition for writ of certiorari.....	8-36
Opinion of Court of Appeals.....	8
Jurisdiction	8
Statement of case.....	8
Specification of errors.....	9
Argument	12
I. The policy was a New York, and not an Illinois, contract	12
II. Under the law of Illinois the soliciting agent of a life insurance company is not authorized or empowered to change or modify a policy on the company's behalf when the application for the policy expressly provides that the soliciting agent shall have no such authority.....	22
III. Under the law of Illinois petitioner could not be held to have ratified the unauthorized agree- ment of its soliciting agent that the premiums on the policy of March 4, 1940, should be pay- able monthly instead of annually by petitioner's acceptance of the first monthly premium on the policy of March 20, 1940, in the absence of any evidence that petitioner knew of the unauthor- ized agreement on the part of its agent when it accepted that premium.....	31
IV. The law of Illinois cannot be constitutionally applied in the determination of the rights and obligations of the parties under a New York contract	32

Cases Cited.

- Aetna Life Ins. Co. v. Dunken, 266 U. S. 389.....8, 11, 33
- Bennati v. John Hancock Mutual Life Ins. Co., 201 Ill.
Ap. 438, 8 N. E. (2d) 551.....15, 19
- Covenant Mutual Life Ins. Co. v. Conway, 10 Ill. Ap.
34810, 22, 24
- Erie Railroad Company v. Tompkins, 304 U. S. 64.... 8
- Erie Ry. Co. v. Johnson (C. C. A. 6), 106 F. (2d) 550..11, 32
- Griffen v. McCooch, 313 U. S. 498, 85 L. Ed. 1481....10, 12
- Guter v. Security Benefit Life Ins. Co., 335 Ill. 174, 166
N. E. 521.....15, 18
- Hartford Accident & Indemnity Co. v. Delta & Pine
Land Co., 292 U. S. 143.....8, 11, 35
- John Hancock Mutual Life Ins. Co. v. Schlenk, 175 Ill.
224, 51 N. E. 795.....15, 16
- Kellogg v. National Protective Life Ins. Co. (Mo. Ap.),
155 S. W. (2d) 512.....10, 12
- Morse v. Illinois Power & Light Co., 294 Ill. Ap. 498, 14
N. E. (2d) 259.....11, 32
- Mulligan v. Metropolitan Life Ins. Co., 149 Ill. Ap.
51615, 21
- New York Life Ins. Co. v. Head, 234 U. S. 149....8, 11, 34
- Phoenix Ins. Co. v. Maxson, 42 Ill. Ap. 164.....10, 22, 25
- Pralle v. Metropolitan Life Ins. Co., 346 Ill. 58, 178
N. E. 371, affirming 252 Ill. Ap. 460.....10, 22, 23
- Rocca v. Metropolitan Life Ins. Co., 300 Ill. Ap. 592,
21 N. E. (2d) 849.....10, 22, 25
- Rozgis v. Missouri State Life Ins. Co., 271 Ill. Ap.
15510, 22, 23

Rummler v. Metropolitan Life Ins. Co., 316 Ill. Ap. 362, 45 N. E. (2d) 86.....	10, 22, 24
Slocum v. New York Life Ins. Co., 228 U. S. 364.....	10, 27
Sommario v. Prudential Ins. Co., 289 Ill. Ap. 520, 7 N. E. (2d) 631.....	10, 22
Winneshiek Ins. Co. v. Holzgrafe, 53 Ill. 516.....	10, 22, 23
Yeats v. Dodson, 345 Mo. 196, 127 S. W. (2d) 652.....	10, 12

Statute Cited.

Judicial Code, Sec. 240 (a), as amended by the Act of Feb. 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347)..	8
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vs.	
MAE G. CHAPMAN,	} Respondent.

PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

**SUMMARY STATEMENT OF THE MATTER
INVOLVED.**

Petitioner, New York Life Insurance Company, instituted this suit in the United States District Court for the Eastern District of Missouri on January 23, 1941 (R. p. 2), to cancel a policy of life insurance for \$10,000 issued to Abel W. Chapman, in which respondent was the beneficiary.

On February 17, 1940, at St. Louis, Missouri, Chapman made written application to petitioner for a policy for \$10,000 and requested in that application that the premiums on the policy should be payable annually and that the policy should take effect as of the date on which it was written (R. p. 65). He agreed in that application that the policy so applied for should not go into force "unless and until the policy is delivered to and received by the applicant and the first premium thereon is paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician or practitioner since his medical examination" (R. p. 66). On the same date, February 17, 1940, Chapman was examined by petitioner's medical examiner at St. Louis, Missouri for this policy (R. p. 56).

Chapman's application was accepted by petitioner at its home office in New York City on March 4, 1940 (R. p. 70), on which date petitioner issued its policy for \$10,000, which provided, as Chapman had requested in his application, for the payment of an annual premium of \$389.50 and that the effective date of the policy was March 4, 1940 (R. p. 72).

On March 17, 1940, when petitioner's soliciting agent, William J. Cusick, undertook to deliver this policy to Chapman, at Belleville, Illinois, where Chapman resided, the latter informed him that he could not pay the first annual premium and that he wanted the premiums on the policy payable monthly instead of annually. Cusick told him that this could be arranged and that the monthly premium would be \$34.70 (R. p. 106). Chapman thereupon paid Cusick the first monthly premium of \$34.70 and Cusick returned the policy to the home office of petitioner in New York City (R. pp. 106-107), where, on March 20, 1940, it was rewritten and reissued by petitioner on a monthly premium basis (R. pp. 71, 73, 48). The reissued

policy, which is dated March 20, 1940, provided that its effective date was March 17, 1940 (R. p. 48), instead of March 4, 1940, the effective date of the original policy (R. p. 72).

Following Chapman's death on August 9, 1940 (R. p. 98), petitioner learned that he had, between February 17, 1940, and March 17, 1940, consulted Dr. William H. Walton for stomach pains and that Dr. Walton had found, upon a gastrointestinal examination of Chapman on March 16, 1940, that he was afflicted with a duodenal ulcer (R. pp. 75-76). As the policy provided that it would be incontestable after two years from its date of issue, petitioner, within that period, filed this suit, in which it alleged (R. pp. 10-15) that the policy was a New York contract; that under the New York law it was Chapman's duty to disclose to petitioner not only that he had consulted and been treated by a physician between February 17, 1940, and March 17, 1940, but also that it was his duty to disclose to petitioner prior to March 20, 1940, the date of the issuance of said policy, that he was afflicted with a duodenal ulcer and that his failure so to do constituted a fraud upon petitioner and a breach of good faith on his part.

It was established without dispute or contradiction at the trial that Chapman had consulted Dr. Walton on March 12, 1940 (R. p. 83); that Dr. Walton instructed him to return on March 16, 1940, for a gastrointestinal examination, which Dr. Walton performed on that date and which took about eleven hours (R. p. 85); that Dr. Walton, as the result of his examination of Chapman on March 16, 1940, suspected that he was afflicted with a duodenal ulcer (R. p. 88) and that his suspicion in that respect was confirmed by a laboratory report of a gastric analysis which was received by Dr. Walton on March 18, 1940, and on that date Dr. Walton advised Chapman of his affliction with a duodenal ulcer (R. p. 89).

The respondent filed a counterclaim to recover on the policy in the District Court (R. p. 21) and, although a jury was summoned to try the issues (R. p. 47) nevertheless, at the close of all the evidence a jury was waived and the case was submitted to the Court (R. p. 127). The District Court found in favor of respondent on petitioner's cause of action and ordered a dismissal of the petition. The District Court likewise found in favor of respondent and against petitioner on respondent's counterclaim and entered judgment against petitioner on that counterclaim for the sum of \$9,965.30 (R. pp. 29-30). The judgment of the District Court was affirmed by the United States Circuit Court of Appeals (R. p. 143).

THE HOLDING OF THE COURT OF APPEALS.

The Court of Appeals held that the policy which petitioner sought to have canceled was an Illinois and not a New York contract. The basis for this holding by the Court of Appeals was:

1. Cusick as the soliciting agent of petitioner was authorized to deliver to Chapman in Illinois the policy of March 4, 1940; that when Cusick called on the insured at Belleville, Illinois, on March 17, 1940, to deliver that policy his power and authority to change and modify the policy on petitioner's behalf was determinable by the law of Illinois; that notwithstanding the agreement of Chapman in his application for that policy that "only the President, a Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts or waive any of the Company's rights or requirements," nevertheless under the Illinois law the soliciting agent of a life insurance company may bind the company by immaterial changes in the policy; that on March 17, 1940, Cusick at Belleville, Illinois, agreed that the premiums on the policy which had been issued by petitioner on

March 4, 1940, should be payable monthly instead of annually and also that the effective date of that policy should be March 17, 1940, instead of March 4, 1940, and that these were immaterial changes or modifications of the policy of March 4, 1940, which Cusick, under the Illinois law, had the power and authority to make on petitioner's behalf notwithstanding Chapman's agreement in the application for that policy that a soliciting agent should have no power or authority to make or modify any contract on petitioner's behalf. Therefore as Cusick in Illinois had on March 17, 1940, changed and modified the policy of March 4, 1940, in these particulars the Court of Appeals held that that policy became effective in Illinois on March 17, 1940, when Chapman paid the first monthly premium of \$34.70 on the policy of March 4, 1940, as so modified.

2. The Court of Appeals also held that even on the assumption that Cusick, the soliciting agent, had no authority on petitioner's behalf to change or modify the policy of March 4, 1940, by providing that the premiums thereunder should be payable monthly in the sum of \$34.70 instead of annually in the sum of \$389.50, nevertheless, "when the company accepted the monthly premium and the succeeding monthly premiums it ratified the agent's act, and such act related back to the date and place of said act" (R. p. 140).

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The holding of the Court of Appeals that the policy which petitioner sought to have canceled was an Illinois, and not a New York, contract is contrary to the holding of the Illinois courts and also to the holding of this Court. This involves an important question of conflict of law which ought to be finally determined by this Court.

2. The application by the Court of Appeals of the Illinois law in the determination of petitioner's obligations under a policy of life insurance which was a New York contract deprives petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

3. The holding of the Court of Appeals that under the law of Illinois the soliciting agent had the right and power on petitioner's behalf to change and modify a policy of life insurance, despite the provision and agreement of the insured in his application for said policy that only certain designated executive officials of petitioner were authorized to make or modify contracts on its behalf, by providing that the premiums on the policy shall be payable monthly instead of annually and that the effective date of the policy should be March 17, 1940, instead of March 4, 1940, is contrary to the law as announced by the Illinois courts.

4. The holding of the Court of Appeals that even if petitioner's soliciting agent had no authority on petitioner's behalf to change the premiums payable under the policy of March 4, 1940, from an annual to a monthly basis, nevertheless, the petitioner ratified this unauthorized change or modification of that policy by the soliciting agent by its acceptance of the first and subsequent monthly premiums is contrary to and in conflict with the rule of law in Illinois that a principal cannot be held to have ratified an unauthorized act of an agent in the absence of evidence that the principal knew of the unauthorized act of the agent at the time of his alleged ratification thereof.

Wherefore, your petitioner prays that a writ of certiorari be issued by this Court to the United States Circuit Court of Appeals for the Eighth Circuit directing that court to certify and send to this Court for its review and deter-

mination, a full and complete transcript of the record and all proceedings in New York Life Insurance Company, a Corporation, Appellant, v. Mae G. Chapman, Appellee, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in said cause be reversed by this Court.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

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